NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
LESLEY JONES-RANDALL, Appellant	:	No. 2926 EDA 2011

Appeal from the Judgment of Sentence October 28, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division No(s).: CP-51-CR-0004832-2011

BEFORE: FORD ELLIOTT, P.J.E., OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: March 7, 2013

Appellant, Lesley Jones-Randall, appeals from the judgment of sentence of one year of non-reporting probation, entered in the Philadelphia County Court of Common Pleas, following her bench conviction of simple assault.[1] She argues she is entitled to an arrest of judgment because the Commonwealth failed to prove she did not act in self defense. In its opinion, the trial court agrees.[2] We vacate the judgment of sentence.

The victim in this simple assault case is Appellant's sister-in-law, Towana Randall. At the time of the underlying incident, Appellant and her

---

* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S. § 2701(a)(1).

[2] Appellant's brief does not acknowledge the trial court opinion's discussion.

husband, Marc Randall, were estranged. N.T., 10/28/11, at 18. Marc had "full custody" of their four-year old daughter, and Appellant had visitation rights from 9:00 a.m. to 5:00 p.m., seven days a week. ***Id.*** at 27-28. On August 23, 2009, at 4:15 or 4:30 p.m., Appellant arrived at the home of Towana's mother's ("Grandmother") to visit her daughter. A physical altercation ensued, and Appellant bit Towana's wrist.

This case against Appellant proceeded to a bench trial on October 28, 2011, on the charges of one count each of simple assault and recklessly endangering another person.[3] Both charges relate to Appellant's actions against Towana only. Appellant presented a theory of self-defense.[4] The only witnesses were Appellant and Towana.[5] Both testified that when Appellant arrived, there were several people—all family members of Appellant's husband—present at Grandmother's house. However, their accounts of the ensuing events conflicted. Because of the nature of Appellant's issue on appeal, we review the trial testimony in detail.

Towana testified to the following. Appellant first talked to Grandmother about the timing of her visit. N.T. at 11-12. Towana's

---

[3] Additional charges of burglary and trespassing were withdrawn prior to trial.

[4] ***See*** 18 Pa.C.S. § 502 ("In any prosecution based on conduct which is justifiable under this chapter, justification is a defense.").

[5] In addition, the parties stipulated that if Appellant were to call her adult son to testify, he would testify as to Appellant's reputation in the community as an honest, law-abiding, and peaceful citizen. N.T. at 16.

daughter—and Appellant's niece—Michelle Randall, was sitting and holding Appellant's daughter in her lap. ***Id.*** at 6. Appellant approached them and, without saying anything, hit Michelle's face with a closed fist. ***Id.*** at 7-8, 12. This caused Michelle to drop the child off her lap. ***Id.*** at 8. Appellant and Michelle got in a "scuffle" and "were both swinging." ***Id.*** at 8, 10. Towana tried to separate them as follows: "[I put] my hands between the two, trying to separate them." ***Id.*** at 8-9. At trial, Towana demonstrated her actions, and the trial court described them as: "Both hands like in a praying situation as to try to break them up." ***Id.*** at 14. Appellant bit Towana's right wrist, breaking her skin and a bracelet. ***Id.*** at 9.

Appellant testified to the following. She arrived at the home late due to a job interview that morning. ***Id.*** at 29. Another of Towana's daughters, Amira told Appellant she could not see her child "because [Amira] was doing her hair." ***Id.*** at 19. Appellant first talked to Grandmother in the kitchen and then "went into the room" and told Amira that she "was there to see [her] child." ***Id.*** Appellant testified:

> Michelle . . . came running into the living room and she and I got into a confrontation. She held my daughter away from me and I am trying to pick my daughter up. So, instead of doing a tug-of-war type of thing, I just let my daughter go.
>
> She had my daughter on her lap. We were arguing back and forth and she put her finger in my face. I pushed her hand out of my face and she hit me. I did not hit her first.

Id.

Appellant denied that her child fell on the floor, and specifically denied that Towana only tried "to break up the fight." ***Id.*** at 19, 21. Instead, Appellant testified, Towana acted as follows:

> [Towana] jumped in and she was around my back, her arm was around my neck and that is how her hand went into my mouth. I had scratches on my back, bruises on my elbow and I had lumps and hickies in my head.

Id. at 20. Four additional people attacked her: "[T]he uncle had my right arm behind me[,]" "Amira and her [sic] other daughter had me by my hair," and another aunt, Midge, hit her in the head. ***Id.*** at 20, 21.

On cross-examination, Appellant summarized Towana's actions as follows:

> [Appellant:] . . . Somebody was trying to separate us and people were on my back and . . . hitting me also.
>
> * * *
>
> [Towana] was behind me. And she grabbed me around my neck like a hold, like this (indicating).
>
> [Appellant's counsel:] Indicating like a wrestling hold around her neck.

Id. at 25. Appellant knew it was Towana who was behind her because she heard Towana's voice "right in [her] ear calling [her] names[.]" ***Id.*** at 26.

Appellant testified:

> [Appellant:] And that's when her arm went into my mouth. I didn't intentionally bite anybody, eve[n] though I felt like all the things that was going on, I think that would have been something that a person could have done in defense.

> [Commonwealth:] So, her arm ended up in your mouth and you did bite her?
>
> [Appellant:] I must have bit her. If she said I bit her, I bit her. . . . [S]o many people were hitting me at that time, I was defending myself. . . .

Id. at 25-26. Appellant testified that she did not remember biting Towana. ***Id.*** at 26. Appellant was treated at the hospital for a headache, lumps on her head, and scrapes on her back. ***Id.*** at 21-22.

The trial court found Appellant guilty of simple assault. It reasoned that once the family refused to allow Appellant to see her daughter, she could have called the police, but could "not impose [her] will." ***Id.*** at 33. The court found Towana "tried to stop the fight[, a]nd even if she put her arm around [Appellant's] neck," Appellant "had no justification in biting her, because [she was] an aggressor and a trespasser." ***Id.*** The court thus did not find self defense.

The case proceeded immediately to sentencing, and the court imposed a sentence of one year of non-reporting probation.[6] ***Id.*** at 38. Appellant did not file a post-sentence motion, but took this timely appeal. She also complied with the court's order to file a Pa.R.A.P. 1925(b) statement of errors complained of on appeal.

Appellant presents one issue for our review: whether she is entitled to an arrest of judgment for simple assault, where the Commonwealth failed to

---

[6] Appellant was advised of her rights to file a post-sentence motion and an appeal. N.T. at 39; ***see*** Pa.R.Crim.P. 704(C)(3)(a).

prove she did not act in self defense. For ease of discussion, we first set forth the relevant law. The Pennsylvania Supreme Court has stated:

> In reviewing a claim based upon the sufficiency of the evidence, the appellate court must view all the evidence in the light most favorable to the verdict winner, giving that party the benefit of all reasonable inferences to be drawn therefrom. A person commits simple assault if he "attempts to cause or intentionally, knowingly, or recklessly causes bodily injury to another." ***See*** 18 Pa.C.S. § 2701(a)(1). Bodily injury is the "impairment of physical condition or substantial pain." ***See*** 18 Pa.C.S. § 2301. In order to obtain a conviction for simple assault, the Commonwealth was required to demonstrate beyond a reasonable doubt that [the defendant] knowingly injured the victim. . . .
>
> The use of force against a person is justified when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person.[7] ***See*** 18 Pa.C.S. § 505(a). When a defendant raises the issue of self-defense, the Commonwealth bears the burden to disprove such a defense beyond a reasonable doubt. While there is no burden on a defendant to prove the claim, before the defense is properly at issue at trial, there must be some evidence, from whatever source, to justify a finding of self-defense. If there is any evidence that will support the claim, then the issue is properly before the fact finder.
>
> . . . Once [evidence of self defense] was adduced, the burden [is] on the Commonwealth to disprove [the defendant's] defense beyond a reasonable doubt.

---

[7] "Unlawful force" is defined as: "Force, including confinement, which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or would constitute such offense or tort except for a defense (such as the absence of intent, negligence, or mental capacity; duress; youth; or diplomatic status) not amounting to a privilege to use the force." 18 Pa.C.S. § 501.

Commonwealth v. Torres, 766 A.2d 342, 344-45 (Pa. 2001) (some citations omitted).

> Finally, we note that the Commonwealth cannot sustain its burden of proof solely on the fact finder's disbelief of the defendant's testimony. The "disbelief of a denial does not, taken alone, afford affirmative proof that the denied fact existed so as to satisfy a proponent's burden of proving that fact." The trial court's statement that it did not believe [the defendant's] testimony is no substitute for the proof the Commonwealth was required to provide to disprove the self-defense claim.

Id. at 345 (citations omitted).

At this juncture we note that both the trial court and Appellant apply the following legal analysis: The Commonwealth sustains its burden of negating self defense if it proves the defendant was not free from fault in provoking or continuing the difficulty, the defendant did not reasonably believe he was in imminent danger of bodily harm, or the defendant violated a duty to retreat. ***See*** Trial Ct. Op. at 2; Appellant's Brief at 13-15. However, these principles apply in cases of **deadly** force. ***See*** 18 Pa.C.S. § 505(2)(i)-(ii) ("The use of **deadly** force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death [or] serious bodily injury . . . nor is it justifiable if . . . the actor, **with the intent of causing death or serious bodily injury**, provoked the use of force . . . [or] knows that he can avoid the necessity of using such force with complete safety by retreating . . .); ***see also Commonwealth v. Mouzon***, 53 A.3d 738, 740-41 (Pa. Super. 2012) ("[A] claim of self-defense . . . requires

evidence establishing three elements: "(a) [that the defendant] reasonably believed that he was in imminent danger of death or serious bodily injury and that it was necessary to use **deadly** force against the victim to prevent such harm; (b) that the defendant was free from fault in provoking the difficulty which culminated in the **slaying**; and (c) that the [defendant] did not violate any duty to retreat."). Because the force in the instant matter was not deadly, and Appellant was not charged with intent to cause serious bodily injury, we do not employ this analysis. Instead, we apply the law as stated in ***Torres***, ***supra***, which likewise concerned self defense in defense of a simple assault charge. ***See Torres***, 766 A.2d at 343-44.

As stated above, Appellant argues the Commonwealth failed to establish that she did not act in self defense. First, she avers the court erred in finding she was trespassing, when she was at Grandmother's home to exercise her visitation rights, and there was no evidence that she was told to leave. Appellant also maintains there was no evidence that she "was the aggressor as to the victim, Towana," and instead, the Commonwealth's evidence "was that Towana was placing her hands on [A]ppellant in an attempt to break up the scuffle when Towana was bitten." Appellant's Brief at 14-15. Appellant cites her own testimony that Towana held her in a choke hold and five people were attacking her at once. Accordingly, she asserts she "reasonably believed that the use of force was immediately necessary" to protect herself against Towana's use of unlawful force, and to

free herself. ***Id.*** at 15. Furthermore, Appellant alleges there was no duty to retreat, and thus she was not in violation of any duty to retreat. Appellant then argues in the alternative that she employed justifiable self-defense against the four other individuals attacking her.

Preliminarily, we determine whether Appellant's issue goes to the weight or sufficiency of the evidence. Although there was conflicting testimony as to whether Appellant or Michelle hit the other first, the manner in which Towana tried to separate them, and how many people participated in the fight, Appellant's arguments on appeal are not contingent on which version of these events should be believed. Instead, Appellant's issue is whether there was evidence that she was told to leave the premises and that she was the aggressor to Towana. Appellant's Brief at 14. We construe these as a challenge to the sufficiency of the evidence.[8]

In its Pa.R.A.P. 1925(a) opinion, the trial court **agrees** "there are reversible errors entitling [Appellant] to an Arrest of Judgment," where "the Commonwealth failed to meet [its] burden in disproving beyond a reasonable doubt[ ] that [Appellant] acted in self-defense." Trial Ct. Op. at 3, 4-5.

With respect to a trial court's finding that its own analysis was incorrect, this Court has stated:

---

[8] A defendant may challenge the sufficiency of evidence for the first time on direct appeal. ***See*** Pa.R.Crim.P. 606(A)(7).

> [W]hen considering a motion for an arrest of judgment, the trial judge cannot alter the verdict based upon a redetermination of credibility or a re-evaluation of the evidence. . . .
>
> . . . [A]t the post-verdict stage of the proceedings, the trial court "is limited to rectifying trial errors, and cannot make a redetermination of credibility and weight of the evidence."
>
> Thus, a post-verdict court may not reweigh the evidence and change its mind . . . . Although a post-verdict judge may question a verdict, his discretionary powers are limited to a determination of whether the evidence was sufficient to uphold the original verdict, and he may not alter the original verdict and substitute a new one. The trial court's verdict must be accorded the same legal effect as a jury verdict. Post-trial, the court cannot re-deliberate as it is no longer the fact finder. Just as jurors are not permitted to testify as to the mental processes that led to their verdict, so is the trial court precluded from testifying as to its flawed thought process as a fact finder.

Commonwealth v. Robinson, 33 A.3d 89, 94 (Pa. Super. 2011) (citations omitted), *appeal denied*, 42 A.3d 292 (Pa. 2012).

In light of the foregoing, we review the nature of the trial court's reasoning in support of arrest of judgment. The trial court stated that "the testimony did not establish whether [Appellant] was let in the house or was told to leave, such as to show trespass," and thus it erred in finding she was a trespasser. Trial Ct. Op. at 3. The court also noted that Towana "testified that she inserted herself into the altercation by attempting to spread [Michelle] and [Appellant] apart," and thus found Appellant "was not an aggressor with regards to" Towana. ***Id.*** at 4. The court also found, in its

opinion, that the Commonwealth failed to disprove Appellant's testimony that she bit Victim in order "to get out of the choke hold." ***Id.*** The court reasoned that Appellant "was not under a duty to retreat" and thus "was not in violation of a duty to retreat." ***Id.***

We find this above analysis likewise goes to the sufficiency, and not weight, of the evidence. Accordingly, we may consider the court's reasoning in our review of Appellant's issue. ***See Robinson***, 33 A.3d at 94. We also reject the Commonwealth's intimation that this Court cannot consider the trial court opinion because the "opinion is not part of the record for purposes of appeal." ***See*** Commonwealth's Brief at 6 (citing Pa.R.A.P. 1921). To the contrary, the opinion was filed with the court clerk and entered on the docket, and is thus a part of the certified record for appeal.

After an independent review of the record and both parties' briefs, we agree with the trial court that the Commonwealth failed to present evidence to disprove Appellant's claim of self defense. Appellant testified that she was trying to free herself from Towana's choke hold and from four other people attacking her at the same time. Once this evidence was introduced—notwithstanding whether the finder of fact would ultimately believe it—the Commonwealth bore the burden of disproving that Appellant believed that the use of force against Towana was "immediately necessary for the purpose of protecting [herself] against the use of unlawful force by" Towana. ***See*** 18 Pa.C.S. § 505.

The Commonwealth argues that Appellant admitted she bit Towana, and "so she certainly was the aggressor." Commonwealth's Brief at 4. We reject such an interpretation—that in a self defense analysis, the defendant's use of force in response to an attacker can also serve as the act of initial aggression. Secondly, although the Commonwealth presented an alternate theory of events—that Towana placed her hands between Appellant and Michelle in an effort to separate them—the Commonwealth did not disprove Appellant's statement that she reasonably believed she was in imminent danger of bodily harm and that it was necessary to use force to free herself. ***See Torres***, 766 A.2d at 345. As stated above, "the Commonwealth cannot sustain its burden of proof solely on the fact finder's disbelief of the defendant's testimony." ***Id.***

In light of all the foregoing, we agree with the trial court that the Commonwealth failed to present evidence to disprove Appellant's claim of self defense. Accordingly, we reverse Appellant's conviction of simple assault and vacate the judgment of sentence.

Conviction reversed. Judgment of sentence vacated. Panel jurisdiction relinquished.

Olson, J. concurs in the result.

Ford Elliott, P.J.E. notes dissent.